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No. 91-1363

In The

Supreme Court of the United States

October Term, 1991

GARY JOHNSON, STATE'S ATTORNEY OF KANE COUNTY; JOHN RANDALL, SHERIFF OF KANE COUNTY; ROLAND W. BURRIS, ATTORNEY GENERAL OF THE STATE OF ILLINOIS,

Petitioners,

vs.

CHI FENG SU,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a court of appeals lacks jurisdiction over unnamed parties, when the phrase, "et al.," is used in the caption of a Notice of Appeal, rather than the specific names of the parties to the appeal; and where the body of said Notice of Appeal likewise fails to specifically name the parties to the appeal.

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CHI FENG SU, Respondent herein, prays that Petitioners' request for a Writ of Certiorari be denied, and that the judgment of the United States Court of Appeals for the Seventh Circuit, entered on September 20, 1991, be not disturbed.

OPINION BELOW

The order of the United States Court of Appeals for the Seventh Circuit is not reported. It is reproduced in the

Appendix to Petitioners' Petition for Writ of Certiorari (Petitioners' Br. 1a). The opinion of the United States District Court for the Northern District of Illinois, Eastern Division, is reported at 737 F. Supp. 488 (N.D. Ill. 1990).

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on September 20, 1991, dismissing the appeal for lack of jurisdiction. No petition for rehearing was filed. The jurisdiction of this court is invoked pursuant to 28 U.S.C. §1254(1). Petitioners claim to have timely filed their petition in this court pursuant to §2102(c). Respondent suggests Petitioners meant to say 2101(c).

Respondent submits that because the Seventh Circuit Court of Appeals held Petitioners' notice of appeal to the seventh circuit to have been inadequate to confer jurisdiction based on a failure to name the appealing parties, then the record must, by definition, leave this court void of any indication of who has or has not complied with the 90-day time constraint for the filing of a petition for certiorari. It is clear, however, that the 90 days would have had to begin running from the date the last order was entered which would have clearly and adversely affected the specific rights of a specific, known party. Therefore, those Petitioners not expressly named in the notice of appeal are well beyond the 90-day period imposed by §2101(c).

STATUTE INVOLVED

Federal Rule of Appellate Procedure 3(c)

Content of the Notice of Appeal. The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken. Form 1 in the Appendix of Forms is a suggested form of a notice of appeal. An appeal shall not be dismissed for informality of form or title of the notice of appeal.

STATEMENT OF THE CASE

A grand jury in Kane County, Illinois, indicted Chi Feng Su, M.D., of 55 counts of delivery of controlled substances to undercover agents, in violation of Section 1401 of the Illinois Controlled Substances Act. Ill. Rev. Stat., 1971, ch. 56½, §1401. The counts were ordered chronologically, the earlier alleged deliveries having been charged in the lower counts, the later alleged deliveries, in the higher counts.

Robert Casey, the state's attorney at the time, elected to prosecute Dr. Su only on counts 41 through 55, but to elicit evidence relating to all 55 counts, as part of his effort to establish motive, intent, method of operation, and common scheme.

The case proceeded to a bench trial in the Kane County Circuit Court, before Judge John L. Nickels. At the trial, the state's attorney elicited evidence from the undercover agents, relating to all 55 counts. (Benigno,

R.301-340; Satriano, R.136-162; Jones, R.191-210; and Gore, R.231-285). The record does not disclose the state's attorney's case-in-chief ever distinguished between those counts on which Dr. Su was being prosecuted, and the counts on which he was not.

In presenting his hypothetical question to the state's experts during the trial, the prosecution included **all** the visits by each agent to Dr. Su, and **all** the prescriptions issued to them. (R.727-740; 846-858). In essence, the state presented all the evidence it had from the undercover agents on each of the deliveries of controlled substances, from the earliest, in July, 1986, to the latest, in November, 1986. The state sought opinions from its experts on all those alleged interactions between the agents and Dr. Su.

At the conclusion of the trial, on November 2, 1987, Judge Nickels acquitted Dr. Su, ruling the prosecution had failed to prove, beyond a reasonable doubt, he had delivered controlled substances outside the ordinary course of medical treatment. (R.1450-1451) There was "no issue" that the prescriptions had been written by Dr. Su, and that they were for controlled substances, the court observed. (R.1443) However, the "largest and most contested issue is whether or not the Defendant issued the prescriptions in question within the ordinary course of medical care and treatment of [the patients/agents]." (R.1443).

The court's reference to "the regular course of . . . treatment" was to Section 1312(h) of the Controlled Substances Act, which provides that prescriptions not issued in the regular course of professional treatment violate the law. Ill.Rev.Stat., 1971, ch. 56½, §1312(h). In examining

this issue, the court considered a number of factors, and concluded Dr. Su's records had been kept in the ordinary course of, and contemporaneously with, his treatment of the undercover agents. (R.1445) It observed that on each agent's initial visit, he or she had received a physical examination; and, on each successive visit, had been personally seen by the doctor, who had made and maintained notes of their visits. (R.1447) The court emphasized the doctor could have prescribed the drugs without even having met with the patients. (R.1447)

Perhaps most significantly, the court observed, the prosecution never demonstrated a clear financial motive (R.1480):

> This was the thing that I kept looking for throughout this to sort of "beef up" this theory that the state has that the doctor was guilty of wrongdoing here. And I can see no reason for the doctor doing this. . . . But in order for a doctor to lay his license on the line and to prescribe these things inappropriately, for no reason, it just simply doesn't make sense to me. And I'm not able to find any reason for the doctor having done what the state claims he did.

After the acquittal, the state's attorney announced his intent to prosecute Dr. Su on counts 1 through 40 of the indictment, and moved for substitution of judges, arguing the court was now predisposed to rule against the state, having heard **all** the evidence, in the first trial, which the prosecution intended to re-use in the second trial. (C.63) Dr. Su simultaneously filed a motion to dismiss the remaining 40 counts, based on collateral estoppel and double jeopardy.

In support of its motion to substitute judges, the prosecution argued (R.1473):

> The evidence on the remaining counts would be basically the same. . . . They would be different days and different drugs prescribed, but basically the same evidence and basically the same opinions. He [Judge Nickels] has already determined that that's insufficient.

The state's motion for substitution was denied, as was its subsequent request that the judge recuse himself. Dr. Su's motion to dismiss the first 40 counts based on double jeopardy was also denied. (C.70;82;126)

Dr. Su appealed the denial of his motion to dismiss to the Second District Illinois Appellate Court, which, on March 30, 1989, affirmed the lower court's decision. On October 5, 1989, his petition for leave to appeal the appellate court's ruling to the Illinois Supreme Court was denied.

On June 5, 1989, Dr. Su petitioned the District Court for the Northern District of Illinois for a writ of habeas corpus, which named, as respondents, the then-State's Attorney of Kane County, Robert Casey; the Sheriff of Kane County, John Randall; and then-Illinois Attorney General, Neil Hartigan. On May 10, 1990, Judge Alesia, in a 9-page Memorandum and Opinion, granted Dr. Su's petition, and issued the writ. A copy of this opinion is set forth in the Appendix to Petitioners' Petition for Writ of Certiorari. (Petitioners' Br. 5a)

On June 7, 1990, Robert Casey filed a purported Notice of Appeal of Judge Alesia's order, which did not name or identify the parties actually appealing the ruling.

A copy of this purported notice is set forth in the Appendix to Petitioners' Petition for Writ of Certiorari. (Petitioners' Br. 7a)

On September 20, 1991, following oral argument on both the procedural issue of jurisdiction, and the substantive issue of double jeopardy, the Seventh Circuit dismissed the appeal for lack of jurisdiction. A copy of this opinion is set forth in the Appendix to Petitioners' Petition for Writ of Certiorari. (Petitioners' Br. 1a) Well after the mandated had issued, Petitioners unsuccessfully attempted to recall the mandate. Their petition to this court followed.

REASONS FOR DENYING THE WRIT

RULE 3(C) OF THE FEDERAL RULES OF APPELLATE PROCEDURE REQUIRES THAT THE NOTICE OF APPEAL SPECIFY THE PARTIES TAKING THE APPEAL. THE USE OF THE PHRASE, "ET AL.," IN THE CAPTION OF THE NOTICE OF APPEAL, COUPLED WITH THE FAILURE OF THE BODY OF THE NOTICE OF APPEAL TO SPECIFICALLY NAME THE APPELLANTS, LEFT THE COURT WITHOUT JURISDICTION IN THIS MATTER.

Dr. Su was tried on 15 of 55 counts of delivery of controlled substances, in a bench trial before a circuit judge in Kane County, Illinois. The prosecution elicited evidence relating to all 55 counts, in an effort to establish motive and intent. It failed; and Dr. Su was acquitted.

The state's attorney opted to prosecute Dr. Su on the remaining counts. Dr. Su's protestations, based on the constitutional guaranty against double jeopardy, falling

on deaf ears. When his state court remedies failed him, Dr. Su turned to the federal court, which saw fit to grant his petition for writ of habeas corpus. A copy of the district court's opinion is set forth in the Appendix to Petitioners' Petition for Writ of Certiorari. (Petitioners' Br. 5a)

The respondents in the petition to the district court were the then-State's Attorney of Kane County, Robert Casey; the Sheriff of Kane County, John Randall; and then-Illinois Attorney General, Neil Hartigan. It is anybody's guess as to which of them opted to appeal the writ's issuance to the Seventh Circuit Court of Appeals.

A Notice of Appeal was filed, the caption of which indicated the Respondents to be "Robert F. Casey, et al." A copy of this purported notice is set forth in the Appendix to Petitioners' Petition for Writ of Certiorari. (Petitioners' Br. 7a) The body of the Notice of Appeal merely said "that respondents, by their attorney, Neil F. Hartigan, Attorney General of the State of Illinois, hereby appeals [sic]. . . . " Casey is the only party named in the caption; no parties are named in the body. (Hartigan was named in the body only in his capacity as attorney of record for the respondents.) Furthermore, a plural noun (respondents) is combined with a singular verb (appeals) to insure the confusion would permeate the record on appeal.

It is no wonder the Seventh Circuit dismissed the appeal for want of jurisdiction. A copy of this opinion is set forth in the Appendix to Petitioners' Petition for Writ of Certiorari. (Petitioners' Br. 1a)

In *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 108 S.Ct. 2405 (1988), the caption of a Notice of Appeal used

the phrase, "et al.," rather than naming the appellants. The particular appellant, who had not been specifically named in the caption or the body of the Notice of Appeal, brought a petition for certiorari to this court. This court held that the use of "et al.," failed to satisfy the specificity requirement of Rule 3(c), which dictates that the Notice of Appeal specify the parties taking the appeal. F.R.A.P. Rule 3(c).

The errant notice had deprived the court of appeals of jurisdiction, this court held, noting "the failure to name a party in a notice of appeal is more than excusable 'informality;' it constitutes a failure of that party to appeal." 487 U.S. at 314, 108 S.Ct. at 2407.

The Notice of Appeal filed by Petitioners is devoid of any reference specifically identifying the party or parties actually pursuing the appeal. Reference to Petitioners' previously filed pleadings would not be of much help in clarifying just whom is meant by "et al.," because the Motion for Extension of Time, Notice of Motion, Memorandum of Law in Opposition to Petition for Writ of Habeas Corpus, Notice of Filing, and the Corrected Memorandum of Law in Opposition to Petition for Writ of Habeas Corpus, all name **only** Robert F. Casey, and do not even say, "et al."

Now, well after the mandate was issued by the seventh circuit, Petitioners applied to this court for certiorari, opting for the infinitely more formal, dignified and wiser approach of expressly naming the parties.

On the first page of their brief, Petitioners slightly misstate the "Question Presented." Petitioners apparently believe the "question" to be "whether a habeas petitioner

and the court below received **fair notice** of the entity seeking to appeal . . . . " (Petitioners' Br. i [Emphasis Added]) But, the question is not whether the court or Dr. Su could guess who was appealing. The question is whether jurisdiction was preserved for appellate review. According to the dictates of federal rules, and this court, it simply was not.

Petitioner argues it filed a "functional equivalent of a notice of appeal," and that all were named as appellants by implication. (Petitioners' Br. 8) Never do Petitioners explain, however, why they believe a "functional equivalent" to something they were supposed to have done is sufficient, when the most critical issue of all is involved: a matter of jurisdiction. When the caption and the body of the Notice of Appeal are read together, it is still ambiguous as to the number and identities of the parties taking the appeal. It is the functional equivalent of the waiving of a right, by licensed, experienced attorneys, and nothing more.

Petitioners argue they have been denied their right to appeal based on "mere technicalities," and ask this court to waive the jurisdictional requirements of Rule 3(c), and exercise jurisdiction over previously unnamed parties, even though the time for filing a notice of appeal has passed. (Petitioners' Br. 11) Petitioners ask this court to treat the jurisdictional requirements of Rule 3(c) as "mere technicalities." But, the jurisdictional requirements of Rule 3(c) are not "mere technicalities." In *Torres*, this court specifically states, 487 U.S. at 315, 108 S.Ct. at 2408:

> Permitting courts to exercise jurisdiction over unnamed parties after the time for filing a notice

> of appeal has passed is equivalent to permitting courts to extend the time for filing a notice of appeal. But although a court may construe the rules liberally in determining whether they have been complied with, it may not waive the jurisdictional requirements of Rules 3 and 4, even for "good cause shown" under Rule 2, if it finds that they have not been met.

If Petitioners are truly concerned about correcting mere technicalities, maybe they should begin by addressing the anomaly as to how those parties **not** named as appellants in the seventh circuit (all but Casey) can now find themselves in the supreme court, and how their petition can be entertained. Rule 2101(c) of the Federal Rules of Appellate Procedure requires that a petition for certiorari be filed within 90 days of the ruling of which review is sought. The writ of habeas corpus was granted on May 10, 1990. Rule 3(c) and this court's holding in *Torres* require that the notice of appeal specifically name the parties taking the appeal. Petitioners were not specifically named on the Notice of Appeal. Therefore, the only ruling which Petitioners can appeal to this court is issuance of the writ of habeas corpus, not the seventh circuit's dismissal for lack of jurisdiction. Because Petitioners did not appeal the writ of habeas corpus within the allocated time period, they are technically too late to have **any** court review this matter.

Petitioners argue that both the court and Dr. Su understood who was seeking the appeal. (Petitioners' Br. 9) But this argument misses the point. Actual confusion is

not a prerequisite to dismissal for failure to strictly comply with the naming requirement of Rule 3(c). *Pride v. Venango River Corp.*, 916 F.2d 1250, 1251 (7th Cir. 1990).

Other courts have held, as did this court in *Torres*, that Rule 3(c) requires parties to be specifically named, regardless of whether actual confusion results as to whom the appellants are. In *Laidley v. McClain*, 914 F.2d 1386 (10th Cir. 1990), the tenth circuit held there was no appellate jurisdiction over appeals of plaintiffs not specifically named as parties in the notice of appeal. Dismissal of the appeals of unnamed plaintiffs was necessary, the court held, even though the caption included the "et al.," designation, the body of the notice stated the "plaintiffs" hereby appeal, and it was asserted that both defendants and the court were aware that all plaintiffs were appealing.

In *Santos-Martinez v. Soto-Santiago*, 863 F.2d 174 (1st Cir. 1988), the first circuit held that appellants listed as "[one non-appealing plaintiff's name] et al.," failed to meet Rule 3(c)'s requirement that the parties be specifically named.

In *Shatah v. Shearson/American Express, Inc.*, 873 F.2d 550 (2nd Cir. 1989), the Second Circuit held the use of the phrase, "et al.," does not satisfy the jurisdictional requirement of Rule 3(c) and that notice of appeal must specify the parties taking the appeal. And, in *Allen Archery, Inc. v. Precision Shooting Equipment, Inc.*, 857 F.2d 1176 (7th Cir. 1988), the Seventh Circuit held Rule 3(c) requires punctilious, literal and exact compliance.

In light of this court's holding in *Torres*, and the plentiful case law in the courts of appeal, it is clear the

jurisdictional requirement of Rule 3(c) can only be met when the appellants are specifically named in the notice of appeal. Any lowering of this standard, by allowing "et al.," and implications as to the parties instead of requiring specific names, would only lead to confusion and guessing as to who are the appellants. But more than that: the use of the phrase, "et al.," fails to comply with jurisdictional requirements, which are the very backbone of the legal process.

CONCLUSION

For all the reasons discussed herein, a writ of certiorari should be denied and the decision of the United States Court of Appeals for the Seventh Circuit should be allowed to stand.

Respectfully submitted,

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Respondent
by, AUGUSTINE, KERN AND LEVENS,
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